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# DURESS AS A DEFENSE IN CRIMINAL CASES.

## THE IMPORTANCE OF THE SUBJECT.

DURESS *per minas* or compulsion by threats has not been frequently invoked as a defense in criminal cases and, as a consequence, the law concerning it is both meagre and uncertain.[1] "Hardly any branch of the law," says a learned English writer,[2] " * * * is more meagre or less satisfactory than the law on this subject." Lord Denman once told a jury,[3] "You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued." There is sufficient truth in this statement to render it remarkable that there should have so seldom been occasion for the courts to consider the defense of duress.

The English Royal Commissioners have said[4] that this defense is "one of every day;" but certainly no justification for this statement is to be found in the authorities. In 1882, Stephen[5] was able to say, "There is very little authority upon this subject. * * * Practically * * * the subject is one of little importance." And, as recently as 1914, another English writer[6] declared that the defense, according to the law of Eng-

[1] Coercion of a married woman by her husband will not be discussed.
[2] 2 STEPHEN, HIST. CRIM. L., p. 105.
[3] Regina *v.* Tyler, 8 C. & P. 616 (1838).
[4] REPORT, ENG. R. COMM., p. 43, n. A.
[5] 2 STEPHEN, HIST. CRIM. L., pp. 106, 108.
[6] STROUD, MENS REA, pp. 26, 264.

land, was of such limited and doubtful application and rare occurrence "as to be scarcely worth noticing in modern times." In the United States, it has been said that examples of the defense of duress "do not often occur," [7] and the "adjudged cases are few in number." [8]

It is conceded that the subject is one of "considerable theoretical interest," [9] and this, together with the recent increase of its practical importance, caused by its more frequent consideration by the courts [10] and legislatures furnishes a sufficient warrant for a discussion of a subject which Markby [11] declares, "Has never, as far as I am aware, been discussed," and of which Stroud says,[12] "The importance * * * has been exaggerated by eminent writers."

## THE PROPRIETY OF THE DEFENSE.

The impropriety of admitting duress as a defense in any case has been seriously asserted. "No man," said an eminent English judge,[13] "from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind. * * * It cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal." Sir James Stephen, after a forensic experience of thirty years, during which he paid special attention to the criminal law, declared, "Compulsion by threats ought in no case whatever to be admitted as an excuse for crime." [14] A recent English writer has declared that the defense "might with advantage be abolished." [15] The In-

[7] 1 McCLAIN, CRIM. L., § 137.

[8] 2 LAWSON, CRIM. DEF., p. 636.

[9] 2 STEPHEN, HIST. CRIM. L., p. 108.

[10] The subject has been considered in two classes of cases: (1) Where the question was whether the defendant was excused because he acted under duress; (2) where the question was whether the testimony of one who participated in a crime under duress was to be regarded as that of an accomplice. See Burns *v.* State, 89 Ga. 527, 15 S. E. 748 (1892).

[11] MARKBY, ELEMENTS L., 6 ed., p. 368.

[12] STROUD, MENS REA, p. 26.

[13] Lord Denman, in Regina *v.* Tyler, *supra.*

[14] 2 STEPHEN, HIST. CRIM. L., p. 108.

[15] STROUD, MENS REA, p. 26.

dian Commissioners proposed, in the first draft of the Indian Code, to eliminate duress as a defense to crime. The Indian Code as published contains a section more lenient than that first proposed.[16]

The criminal law, it is argued, is itself a system of duress or compulsion; it is a collection of threats to the life, liberty and property, of persons who commit crimes, and such threats ought not to be withdrawn as soon as they are encountered by opposing threats. The law which says to a man intending murder, "If you do it, I will hang you," should not withdraw its threat if someone else says, "If you do not do it, I will shoot you." [17]

The premise of this argument is questionable and the conclusion is unsound. The premise seems to be that deterrence is the sole object of the criminal law.[18] Diverse are the opinions and vague is the general idea concerning the specific object of punishment. Certainly no careful scholar would at the present time venture to assert that the theories of criminal punishment current among our judges and legislators have assumed a final and coherent or even a temporarily stable form, or that deterrence has been settled upon as the exclusive object of such punishment.[19]

Perhaps the argument is that deterrence is one of the objects —a very important object—of criminal punishment, and that the furtherance of this object requires the exclusion of duress as a defense. In this case the premise would be justified by the authorities,[20] but would not justify the conclusion.

Punishment for deterrence should be inflicted only where it

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[16] REPORT, ENG. R. COMM., p. 43, n. A.

[17] See 2 STEPHEN, HIST. CRIM. L., p. 107.

[18] "Surely," says Stephen, " it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary." Such a proposition is correct only if deterrence is the sole object of punishment. See MCCONNELL, CRIM. RESPONSIBILITY AND SOCIAL CONSTRAINT, p. 68.

[19] MCCONNELL, CRIM. RESPONSIBILITY AND SOCIAL CONSTRAINT, pp. 3, 4.

[20] "It is quite proper * * * to ascribe the first place among the relative theories to the purpose of deterrence." VON BAR, HIST. CONT. CRIM. L., p. 514. "Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him." SALMOND, JURISP., 5 ed., p. 75.

is possible to deter. Where deterrence is impossible such punishment should be renounced. A man may have motives adverse to the law and of such great strength as to overcome any fear that can be inspired by the terror of any legal punishment. He may be urged to the commission of an act by motives more proximate and imperious than any sanction the law can hold out. In such cases, as the threats of the law are necessarily ineffective, they should not be made, and their fulfilment is gratuitous cruelty—the infliction of needless and uncompensated evil.[21]

An American court [22] has therefore well said:

> "That persons have exposed themselves to imminent peril and death for their fellow man, and that there are instances where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self-sacrifices emanated from other motives than fear of legal punishment. That fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death, unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind, who are controlled by no other higher principle than fear of the law." [23]

Whatever may ultimately be decided to be the proper object of punishment, it is now a generally accepted principle that punishment should be graduated according to the character of the crime committed.[24] This idea is frequently expressed by saying

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[21] AUSTIN, JURISP., p. 515. "Punishment itself must fail to attain its great object where the evil it threatens is less than the evil which would have been suffered if the crime had not warded it off." KENNY, CRIM. L., p. 74.

[22] Arp *v.* State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137 (1892).

[23] "The dread of future penalties cannot be expected to prevail over the certainty of present suffering." ODGERS, COM. L. ENG., p. 124 "The reluctance with which English law admits duress by threats to be an excuse for crime * * * shew again that deterrence cannot be the sole object of punishment; for punishment is thus inflicted where the fear of it could not have sufficed to deter." KENNY, CRIM. L., p. 35.

[24] MCCONNELL, CRIM. RESPONSIBILITY AND SOCIAL CONSTRAINT, pp. 7, 23, 62, 71. But see GARAFALO, CRIMINOLOGY, p. 294.

that punishment should be just or reasonable.[25]. Applying this principle in the application of the deterrent theory of punishment, it would seem to follow that duress should be a defense whenever it creates motives adverse to the law which cannot be controlled by the threat of any reasonable punishment. The criterion of responsibility should not be the powerlessness of any possible but that of any reasonable punishment. Duress should excuse whenever the motive to crime created by it is such as would necessarily countervail the fear of any penalty which it is just and expedient that the law should threaten. In such cases there is in theory no sufficient basis of criminal responsibility.

As a matter of fact, however, perhaps because of the evidential difficulties, a limited scope has been given to the defense of duress. In a very few cases can it be proved with any degree of certainty that the possibility of self-control was really absent and that therefore the deed is one for which the doer is rightfully irresponsible.

In this conflict between the requirements of theory and the difficulties of practice, the law has resorted to a compromise. Most of the authorities are agreed that fear created by threats of certain specified kinds of injuries, if the threats are made in certain specified ways, constitutes a defense to certain specified crimes. There is a considerable difference of opinion among the writers, courts and legislatures as to the character of the injury which must be threatened, the manner in which the threats must be made and the character of the crimes to which such threats would constitute defense.

### The Legal Content and Status of the Defense.

The legal content and status of the defense of duress can be best exposited by considering: (1) The crimes to which it has been held to be a defense; (2) the character of the injury which must be threatened; (3) the manner in which the threats must be made.

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[25] Victor Cousin, in a terse epigram, thus expresses the view which is held by many people: "Punishment is not just because it deters, but it deters because it is felt to be just."

CRIMES TO WHICH DURESS IS A DEFENSE.

Some writers assert that duress does not constitute a defense to any crime.[26] Others are apparently of the opinion that duress may constitute a defense to every crime. "Always an act," says Bishop,[27] "done from compulsion or necessity is not a crime. To this doctrine there can be and is no exception, it is universal." [28] The view supported by the majority of the writers is that duress is a defense to some crimes but not to others. There is a considerable difference of opinion as to the crimes included in each class.

Blackstone says that duress is a defense to "positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment." [29] By other writers it is said that duress is a defense "in some cases;" [30] "to some crimes;" [31] "to minor crimes;" [32] "when the crime is not of a heinous character;" [33] "for many crimes;" [34] "to all but the gravest crimes;" [35] "for committing most, if not all, crimes, except the taking of the life of an innocent person;" [36] "for any crime except murder." [37]

A somewhat similar difference of opinion is to be found in the decisions of the courts. "Duress," says an American court, "relieves from responsibility for crime." [38] "That circumstance," says an English court, "has never been received by the law as

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[26] BROOM, LEGAL MAXIMS, p. 12. See also, HOCHHEIMER, CRIM. L., p. 32.

[27] 1 BISHOP, NEW CRIM. L., 8 ed., § 346.

[28] See also, HAWLEY & MCGREGOR, CRIM. L., p. 2; 12 CYC. 161; 10 AM. & ENG. ENC. L., 2 ed., 346; AUSTIN, JURISP., p. 1061; DESTY, AM. CRIM. L., p. 32.

[29] 4 BLACKSTONE, COM. 30. This passage has been cited as an illustration of Blackstone's weakness in all matters of speculation. 2 STEPHEN, HIST. CRIM. L., p. 106.

[30] RUSSEL, CRIMES, int. ed., p. 145.

[31] KENNY, CRIM. L., p. 73. [32] ROOD, CRIM. L., p. 54.

[33] REPORT, ENG. R. COMM., p. 43, n. A.

[34] 4 STEPHEN, COM., p. 27. [35] ODGERS, COM. L. ENG., p. 123.

[36] 8 R. C. L. 125; note, 106 Am.. St. Rep. 721.

[37] CLARKE, ELEMENTARY L., p. 124; CLARKE, CRIM. L., p. 99.

[38] State *v.* Saunders, 10 Tex. App. 632.

an excuse for * * * crime" [39] Neither of these statements seems to be accurate. The present doctrine of the English courts, as stated in a recent and authoritative work,[40] is that duress is a defense to the crime of "joining with rebels" but to no other crime.[41] In the Uniter States the prevailing doctrine seems to be that duress is a defense to all crimes except murder.[42]

## TREASON.

It has been held in both the United States and England that duress is a permissible defense in prosecutions for treason.[43] Sir Walter Scott said that treason often "arises from mistaken virtue and therefore cannot be considered disgraceful," but it is not because of the veniality of the offense that duress is an allowable defense. The common law ranks treason as the most heinous of all crimes.[44] Blackstone declared [45] it to be "the highest civil crime which * * * any man can possibly commit;" and a recent authority asserts that treason is such a heinous crime that the courts "have been loath to recognize defenses thereto." [46] It is rather remarkable, therefore, that in England treason should have been selected as the one crime to which duress is an allowable defense [47] and that in the United States duress should have been selected as the one defense which is allowable in treason.[48]

Duress was invoked as a defense in a number of prosecutions for treason growing out of the Scottish rebellion in 1746, and "though most of those who set up the defense must have fought in actual battle, and must have killed or assisted in killing, and so brought themselves within the stern rule laid down by Hale,[49] it was never suggested that this made a difference." [50]

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[39] Regina *v.* Tyler, *supra.* [40] 9 HALSBURY, L. ENG. 243.

[41] But in KENNY, CRIM. L., p. 73, it is said, "It is impossible to say with precision for what offenses the defense will be allowed to avail."

[42] 8 R. C. L. 125, and cases cited *infra.*

[43] United States *v.* Greiner, 4 Phila. 396, Fed. Cas. 15262 (1861); United States *v.* Vigol, 2 Dall. 346 (1795); Respublica *v.* McCarty (Pa.), 2 Dall. 86 (1781); McGrowther's Case, Foster C. L. 13 (1746).

[44] 28 AM. & ENG. ENC. L., 2 ed., 457.

[45] 4 BLACKSTONE, COM. 75. [46] 38 CYC. 957.

[47] STROUD, MENS REA, p. 264; 9 HALSBURY, L. ENG. 243.

[48] A recent authority so asserts. 38 CYC. 957. *Sed quere!*

[49] Duress does not excuse killing an innocent man.

[50] REPORT, ENG. R. COMM., p. 43, n. A.

It is stated by some of the English authorities that duress is only a defense for some of the minor forms of treason.[51] Thus East says,[52] "Such compulsion or fear, however, is no excuse for any other sort of treason than that of joining with rebels or enemies." A peculiarity of this kind of treason, which is the only kind recognized in the United States, is that it may be a continuing crime. In such case, it must appear that the duress continued throughout the whole time the defendant was assisting the enemy or rebels. Thus, where the defendant was charged with treason in joining and marching with rebels and the only duress shown was on August 28th, and he continued with the rebels until December 30th, it was held that he was not excused.[53]

East says:[54]

> "It may perhaps be impossible to account for every day, week, or month; and therefore it may be sufficient to excuse him if he can prove an original force upon him, that he in earnest attempted to escape and was prevented, or that he was so narrowly watched, or the passes so guarded, that an attempt to escape or to refuse his assistance would have been attended with great difficulty and danger; and, if the circumstance will admit of it, that he quitted the service as soon as he could; so that upon the whole he may fairly be presumed to have continued amongst them against his will, though not constantly under an actual fear of immediate death. * * * In this respect there is no distinction between serving as an officer or private man, further than the accepting a command in a rebel army is a stronger evidence of willingness than the other."

## HOMICIDE.

It has frequently been asserted that duress does not excuse "the killing of an innocent person." "The authorities seem to be conclusive," says the Alabama court,[55] "that, at common law, no man can excuse himself, under the plea of necessity or com-

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[51] KENNY, CRIM. L., p. 73; ODGER, COM. L. ENG., p. 124.

[52] 1 EAST, P. C. 71.

[53] McGrowther's Case, Foster C. L. 13 (1746).

[54] 1 EAST, P. C. 70, 71.

[55] Arp *v.* State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137 (1892).

pulsion, for taking the life of an innocent person." [56] The question has been discussed by the text writers more frequently than by the courts.[57] The former are practically unanimous in declaring that "no man can excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person." [58]

The correctness of this doctrine has been questioned by several writers. "According to Lord Hale," says East,[59] "a man cannot even excuse the killing of another who is innocent, under a threat however urgent of losing his own life unless he comply. But if the commission of treason may be extenuated by fear of present death, and while the party is under actual compulsion, there seems to be no good reason why this offence may not also be mitigated upon the like consideration of human infirmity." [60]

The argument of East was unsuccessfully relied upon by the defendant in a comparatively recent case.[61] Indicted for murder, the accused argued that "if duress is a defense in treason it should also apply in murder." The court was able to discover two distinctions between treason and murder: (1) Treason is a continuing crime and murder is not; (2) treason is "a positive crime, so created by the laws of society," and murder is "a natural offense so declared by the law of God." Concerning the first distinction the court said, "Treason is usually a continuing act from which there is no possibility of escape * * *. The mere fear of death, therefore, may well be allowed when a loyal

[56] Brewer *v.* State, 72 Ark. 145, 78 S. W. 773 (1904); State *v.* Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715, 3 Ann. Cas. 1026 (1904); State *v.* Fisher, 23 Mont. 540, 59 Pac. 919 (1900); Regina *v.* Tyler, *supra;* People *v.* Martin, 13 Cal. App. 96, 108 Pac. 1034 (1910); Rainey *v.* Commonwealth, 19 Ky. L. Rep. 390, 40 S. W. 682 (1897); Leach *v.* State, 99 Tenn. 584, 42 S. W. 195 (1897).

[57] Brewer *v.* State, *supra.*

[58] 8 R. C. L. 125; 13 R. C. L. 708; 21 Cyc. 832; Wharton, Homicide, 3 ed., § 52; 1 Hale, P. C. 51, 433; 1 Russel, Crimes, § 696; 4 Blackstone, Com. 30; note, 3 Ann. Cas. 1028; note, 106 Am. St. Rep. 721; Bishop, New Crim. L., 3 ed., § 346; Robinson, Am. Jurisp., § 45; Hawley & McGregor, Crimes, p. 2; Harris, Crim. L., p. 31; Clark, Crim. L., p. 100; Clark & Marsshall, Crimes, 2 ed., p. 127.

[59] 1 East, P. C. 294.

[60] See also, 1 Russell, Crimes, 3d Eng. ed., p. 664; Bishop, New Crim. L., 3 ed., § 348.

[61] State *v.* Nargashian, *supra.*

intent may be shown by a possible speedy return to allegiance. But murder is a consummated act, irreparable after commission, and hence to be guarded against by a stricter rule." Concerning the second distinction, the court quoted the statement of Blackstone to the effect that duress is only a defense to crimes "created by the laws of society, and which, therefore, society may excuse," and not to the "natural offenses so declared by the law of God, wherein human magistrates are only the executioners of divine punishment." [62]

The killing of an innocent person, if criminal, may be either murder, voluntary manslaughter, or involuntary manslaughter. There are no cases in which it is decided, or even expressly stated, that a killing which would otherwise be manslaughter may not be excused if it was committed under duress. The homicide cases have all been prosecutions for murder. In none of them has duress been successfully invoked as a defense. The decisions and *dicta* in these cases are, therefore, relied upon as authority for the proposition that duress will not excuse a killing which would otherwise be murder.[63]

One may incur responsibility for murder in various ways. He may commit the act which causes death or simply aid and abet another who commits such act. In either case the person who does the killing may or may not intend to kill. If the person who does the killing intends to kill, the person who aids and abets may or may not know of such intention.

The cases furnish specific answers to only a few of the problems to which these various situations give rise. They simply determine, by *dicta* rather than by decision, that one who intentionally kills an innocent person or who aids and abets another who does so, with knowledge of the latter's intent, cannot exempt himself from responsibility for murder by proving that he acted under duress.[64]

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[62] Another distinction, it is said, is that the crime of treason consists rather in the intent than in the enormity of the crime itself. 1 McCLAIN, CRIM. L., § 127.

[63] KENNY, CRIM. L., p. 73; CLARK, ELEMENTARY L., p. 24.

[64] State *v.* Fisher, *supra;* Arp *v.* State, *supra;* Brewer *v.* State, *supra;* Leach *v.* State, *supra;* State *v.* Nargashian, *supra;* People *v.* Repke, 103 Mich. 459, 61 N. W. 861 (1895); Rizzolo *v.* Commonwealth, 126 Pa. 54, 17 Atl. 520 (1889). But see Regina *v.* Tyler, *supra.*

At common law, and under various statutes, a killing resulting from the perpetration of, or attempt to perpetrate, a felony is murder. This is true although there was no intention to kill and although the acts done were not such as would ordinarily be attended by death. This rule gives rise to the following question: If one is compelled by duress to join in the commission of a felony to which duress is a defense, and during its commission an innocent person is unintentionally killed by the threatener or person threatened, may duress be successfully invoked as a defense in a prosecution of the latter for murder? An answer is found in a recent case.[65] Statutes provided that duress was a defense to all crimes but murder, and that a killing was murder "when committed * * * without a design to effect death, by a person engaged in the commission of, or in attempt to commit, * * * robbery." The court held that a person who was present, aiding in a robbery which was actually committed by another, in the commission of which the victim was killed by such other, could not invoke the defense of duress when he was prosecuted for murder.

The defendant argued that duress was a defense because it was a defense to robbery, which was the only crime in which he participated. The court held that as to robbery the defendant was "in the same situation as if he had physically done every act constituting that robbery," and that it followed, since the killing was committed by one of the defendant's confederates while in the act of committing the robbery, the defendant was "as much responsible for the killing as he is for the robbery," and that, since the statute expressly excluded duress as a defense to murder, he was responsible for the murder.

The fallacy of this argument is apparent. A killing by a person engaged in committing robbery was murder, but as duress was a defense to robbery, the defendant, if he acted under duress, was not committing robbery, and therefore his responsibility for murder cannot be predicated upon the assumption that he was committing robbery. If, as stated by the court, he was as much responsible for the murder as he was for the robbery, it would follow that he was not responsible for the murder, be-

[65] State *v.* Moretti, 66 Wash. 537, 120 Pac. 102 (1912).

cause, as duress was a defense to robbery, he was not responsible for the robbery.

With much better reason, therefore, it has been held in a prosecution for murder, based upon a killing by an accomplice while "robbing a house," that if the defendant "had consented only to the robbing of the house and not to the killing, and at the time of his participation in the robbing had reasonable ground to believe that his life was immediately to be taken unless he participated," he was not guilty of murder.[66]

There are intimations in some of the cases that duress, though it does not excuse a homicide, may reduce its grade.[67] The Pennsylvania court seems to be of the opinion that where a wilful, deliberate and premeditated intent to kill is an essential element of murder in the first degree, duress may preclude a conviction for that crime. In a prosecution for murder the trial court instructed the jury, "But in case you should find * * * that the shots were not inflicted by the defendant, then you will inquire whether or not the acts which he performed there were coerced by fear * * *; whether that explanation which has been given by the defendant is such as would show that he had not the power to form the willful, deliberate, and premeditated intent to take life * * *." The appellate court said, "The question whether the defendant was acting under duress * * * was submitted to the jury under proper instructions as to its effect upon the degree of guilt."[68]

Duress will not reduce a killing which would otherwise be murder to voluntary manslaughter. In answer to the contention that fear, like passion, may so becloud the mind as to eliminate

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[66] Baxter *v.* People, 8 Ill. 368 (1846). Especially if it appeared that the robbery was committed when there was no probability of loss of life being its consequence.

[67] MIKELL, CRIM. CAS., p. 76; note, 106 Am. St. Rep. 723. "Nowhere have we found an express holding that such is the law." Note, 106 Am. St. Rep. 723. The question was expressly left undecided in Brewer *v.* State, *supra*. In State *v.* Nargashian, *supra*, it is said, "If one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor *reduction* on the ground of fear."

[68] Rizzolo *v.* Commonwealth, *supra*. The court added, "We need not pursue this branch of the case further."

malice, it has been said, "The comparison of the two elements of action is not apt. One's own passion is not a defense to reduce a crime unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. Passion induced by a third person would be no defense to a homicide. So fear induced by one person is no defense to a defendant who kills another under its influence." [69]

In some states there are statutes which declare in general terms that duress is a defense to crime. It seems that under such a statute duress may excuse the killing of an innocent person.[70]

### Other Crimes.

There are decisions or *dicta* to the effect that duress is a defense to arson,[71] burglary,[72] bigamy,[73] mutiny,[74] riot,[75] and "dynamiting a house." [77] "Probably the crime of robbery may be excused on the ground of duress." [77] In regard to a prosecution for robbery the Alabama court said, "We are not to be understood as intimating * * * that the defendant would have been excusable if he had acted under duress of life or great bodily harm." [78] Duress may be a defense to perjury.[79] An answer to the question of the Georgia court, "Is perjury, committed in a legal tribunal, in the midst of officers and ministers of the law, with full opportunity to demand surety of the peace, and appeal to the state for protection, one of the offenses for which fear is

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[69] State *v.* Nargashian, *supra.*

[70] Paris *v.* State, 35 Tex. Crim. Rep. 82, 31 S. W. 855 (1895). "We do not interpret this case as expressly so holding." Note, 106 Am. St. Rep. 723.

[71] Ross *v.* State, 169 Ind. 388; 82 N. E. 781 (1907)

[72] Beal *v.* State, 72 Ga. 200 (1883).

[73] Burton *v.* State, 51 Tex. Cr. Rep. 196, 101 S. W. 226 (1907).

[74] United States *v.* Haskell, Fed. Cas. 15, 321 (1823).

[75] Pennsylvania *v.* Morrison (Pa.), Add. 274 (1795); Rex *v.* Crutchley, 5 C. & P. 133 (1832).

[76] People *v.* Martin, 13 Cal. App. 96, 108 Pac. 1034 (1910).

[77] Note, 106 Am. St. Rep. 721.

[78] Thomas *v.* State, 134 Ala. 126, 33 South. 130 (1902).

[79] Bain *v.* State, 67 Miss. 557, 7 South. 408 (1890); McCoy *v.* State, 78 Ga. 490, 3 S. E. 768 (1887). See also, Ross *v.* State, 169 Ind. 388, 82 N. E. 781 (1907).

an excuse?" [80] is furnished by Saunders *v.* State,[81] where a judgment upon a plea of guilty made in open court was reversed and a new trial granted because, in the opinion of the appellate court, the plea was made under duress. It has been suggested that duress is not a defense to rape. " 'Human infirmity' ought not to be tolerated by our laws to the extent of excusing one for the violation of female virtue on the plea of danger to himself however great or imminent." [82]

In some jurisdictions the crimes to which duress is a defense are specified by statute. In Texas it is a defense to all crimes; [83] in Washington and Minnesota to any crime except murder; [84] in California to all but capital crimes; [85] in Canada to all crimes except treason, murder, piracy, attempt to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.[86]

### The Threatened Injury.

Duress may be of different degrees. It is well settled that not every degree is sufficient to constitute a defense to crime; [87] but the authorities are not agreed as to the character of the injury which must be threatened in order that duress may constitute a defense.

Attempts to generalize have been made. "Generally, an act or omission is not a crime," it is said,[88] "or is more or less excusable, if it proceeded from an instant and well grounded fear stronger than the fear naturally inspired by the law." This

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[80] McCoy *v.* State, *supra.* [81] *Supra.*

[82] State *v.* Dowell, 106 N. C. 722, 11 S. E. 525 (1890).

[83] Paris *v.* State, 35 Tex. Crim. Rep. 82, 31 S. W. 855 (1895).

[84] State *v.* Moretti, 66 Wash. 537, 120 Pac. 102 (1912); Minn. Stat. (1894), § 6307.

[85] People *v.* Martin, *supra.*

[86] Canadian Crim. Code, § 20, 55, 56 V. c. 29, § 12. Concerning a similar section in the Draft Code of England, the Royal Commissioners said, "We have framed this section to express what we think is the existing law, and what at all events ought to be the law." Report, Eng. R. Comm., p. 43, n. A.

[87] Robinson, Elementary L., 535, and authorities *infra.* But see Wharton, Crim. L., § 1803a.

[88] Austin, Jurisp., p. 1061. See also, Harris, Crim. L., p. 21.

statement is vague and uncertain and "has never been accepted as a principle of general application in our law." [89]

The defense of duress in criminal cases has been said to be analogous to duress in the case of contracts; [90] but it has been decided that duress which is sufficient to render voidable a contract or sale is not necessarily sufficient to excuse a crime. "It must be obvious to the deliberate judgment of every reflecting mind," says the Georgia court,[91] "that much less freedom of will is requisite to render a person responsible for crime than to bind him by a sale or other contract. To overcome the will, so far as to render it incapable of contracting a civil obligation, is a mere trifle compared with reducing it to that degree of slavery and submission which will exempt from punishment." [92]

A contrary doctrine has recently been asserted.[93] Upon the trial of one for "selling pooled tobacco," in which the defense relied upon was duress, the trial court charged that by the term duress is meant "such threats or violence * * * as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury, to person, reputation, or property." The appellate court, quoting and relying entirely upon civil cases, where the question was whether a contract or sale was avoided by duress, declared that "the instruction presented for the consideration of the jury fairly and fully the law of the case." [94]

In determining the character of the injury which must be threatened, the personal peculiarities of the particular defendant have not been considered. The test has been not whether threats

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[89] STROUD, MENS REA, p. 258.

[90] 1 MCCLAIN, CRIM. L., § 136.

[91] McCoy *v.* State, 78 Ga. 490, 3 S. E. 768 (1887), quoted in Ross *v.* State, 169 Ind. 388, 82 N. E. 781 (1907).

[92] By statute duress sufficient to avoid a contract or sale consisted of "threats of bodily or other harm, or other means * * * tending to coerce the will of another and actually inducing him to do an act contrary to his free will." Code, § 2637. To render duress a defense to crime there must have been threats or menaces which sufficiently show that life or member was in danger, etc. Code, § 4303. To instruct a jury in a criminal case that duress is a defense and at the same time define duress as in § 2637, is erroneous.

[93] Commonwealth *v.* Reffitt, 149 Ky. 300, 148 S. W. 48, 42 L. R. A. (N. S.) 329 (1912).

[94] The character of the criminal act charged may have influenced the court.

of such an injury are sufficient to arouse the requisite fear in such a man as the defendant, but whether they are sufficient to so affect men of ordinary fortitude and courage. The question has been regarded, in absence of statute, as one of law for the court, and in answering it the courts have usually designated certain specific kinds of injury as being the only ones sufficient in the eyes of the law to arouse such fear.

Some courts declare that the injury threatened must be death.[95] Other courts hold that the injury may be either death, or "great" or "serious" or "grievous" bodily harm.[96] Possibly most of the authorities cited can be reconciled by holding that only threats of death are sufficient to excuse treason, but that threats of death or great bodily harm are sufficient to excuse other crimes.[97] A slight or inferior physical injury—anything short of death or great bodily harm— is not sufficient in any case.[98]

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[95] United States *v.* Haskell, *supra* (mutiny); Respublica *v.* McCarty, *supra* (treason); United States *v.* Greiner, *supra* (treason); Baxter *v.* People, *supra* (murder); McGrowther's Case, *supra* (treason). "The fear, which the law recognizes as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party." United States *v.* Vigol, *supra* (treason). See also, 10 AM. & ENG. ENC. L., 2 ed., 347; 8 R. C. L. 125; HAWLEY & MCGREGOR, CRIMES, p. 2. Statutes sometimes declare that the injury must be one which endangers life. Pen. Code, Cal., § 26; People *v.* Martin, *supra.*

[96] People *v.* Repke, 106 Mich. 459, 61 N. W. 861 (1895). "If a person is compelled to commit a crime by threats * * * of death or serious bodily harm * * * this excuses him." Ross *v.* State, 169 Ind. 388, 82 N. E. 781 (1907). See also, Burns *v.* State, 89 Ga. 527, 15 S. E. 748 (1892); Thomas *v.* State, 134 Ala. 126, 33 South. 130 (1902); 12 CYC. 161; STEPHEN, DIG. CRIM. L., § 31; 1 MCCLAIN, CRIM. L., § 137; DESTY, AM. CRIM. L., p. 32; CLARK, ELEMENTARY L., p. 124; 4 STEPHENS COM., p. 27; KENNY, CRIM. L., p. 73; CLARK & MARSHALL, CRIMES, 2 ed., § 83; WHARTON, CRIM. L., § 124. Statutes sometimes declare that the injury may be either death or loss of limb or member or great personal injury or grievous bodily harm. Pen. Code, Ga., § 4303; McCoy *v.* State, 78 Ga. 490, 3 S. E. 768 (1887); Burns *v.* State, *supra;* Paris *v.* State, 35 Tex. Cr. Rep. 82; 31 S. W. 855 (1895); Canadian Crim. Code, § 20, 55, 56, V. c. 29, § 12; Rem. & Bal. Wash. Code, § 2256.

[97] 3 MODERN AM. L., p. 16. But see CLARK & MARSHALL, CRIMES, 2 ed., p. 127.

[98] Respublica *v.* McCarty (Pa.), 2 Dall. 86 (1781); United States *v.* Vigol, 2 Dall. 346 (1795); 8 R. C. L. 125; 12 CYC. 161; CLARK, ELEMEN-

The loss or destruction of, or any outrage upon, real or personal property, is not, according to the great weight of authority, sufficient.[99] In an early Pennsylvania case,[1] however, the court seemed to be of the opinion that one who was indicted for riotously raising a liberty pole could invoke as his defense the fact that a mob had threatened to destroy the town if a liberty pole was not raised, and in a recent Kentucky case [2] the court charged that one indicted for selling pooled tobacco was not guilty if he acted under a just fear of great injury to person, reputation or property.[3]

It has been said that "in accepting duress as an excuse for criminal acts, the law rules the more stringently in proportion to the enormity of the offense committed and its natural effect upon the welfare of society;" [4] and that "the more enormous the crime, the higher is the demand which the law makes on the self restraint of the actor." [5]

The authorities already cited demonstrate, however, that the courts have not carefully graduated the injury which must be threatened to the enormity of the crime for which it is invoked as excuse. The most that can be said is that the courts have made a somewhat illogical attempt at such graduation by declaring that duress is not an excuse for murder; that only threats of death excuse treason; that threats of death or great bodily harm excuse other crimes; and, perhaps, that threats of great injury to reputation or property excuse crimes involving slight moral turpitude and injury.[6]

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TARY L., p. 124; 4 STEPHEN, COM., p. 27. "The apprehension of slight injury furnishes no excuse." United States *v.* Vigol, *supra.*

[99] United States *v.* Greiner, 4 Phila. 396, Fed. Cas. 15,262 (1861); United States *v.* Vigol, *supra;* Respublica *v.* McCarty, *supra;* McGrowther's Case, Foster C. L. 13 (1746); 8 R. C. L. 125; CLARK & MARSHALL, CRIMES, p. 127; 12 CYC. 161; 1 MCCLAIN, CRIM. L., § 137; CLARK, CRIM. L., p. 100; 1 EAST, P. C., p. 71; 4 STEPHEN, COM., p. 27; DESTY, AM. CRIM. L., § 32b.

[1] Pennsylvania *v.* Morrison (Pa.), Add. 274 (1795).

[2] Commonwealth *v.* Reffitt, 149 Ky. 300, 148 S. W. 48, 42 L. R. A. (N. S.) 129 (1912).

[3] But the court seemed to be of the opinion that there was fear of physical injury as well as fear of injury to property.

[4] ROBINSON, AM. JURISP., § 45. [5] ROBINSON, ELEMENTARY L., § 470.

[6] This statement, although it reconciles many of the cases, is not expressly supported by any case.

THE APPREHENSION OF INJURY.

In order that an act which would otherwise be criminal may be excused because committed under duress, the person committing it must have actually believed, in good faith, that unless he did so, an injury of the kinds previously specified would be inflicted upon him, and he must have acted solely because of this belief.[7]

In determining this, it is proper to consider the age, power of will, courage and intelligence of the defendant as exhibited by himself on the witness stand and as shown by other witnesses.[8] The fact that he was weak in will power, easily persuaded, timid and shy,[9] or that he was an infant of tender years[10] is admissible to prove that he acted under the influence of fear. The question is one of fact for the jury.[11]

THE REASONABLENESS OF THE APPREHENSION.

The belief of the defendant must have been reasonable.[12] It must have been based upon reasonable "cause" or "ground," "such, *qui cadere possit in virum constantem, non timidum et meticulosum,*" as Bracton expresses it in the words of the civil

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[7] Pirkle *v.* State, 11 Ga. App. 98, 74 S. E. 709 (1912); Arp *v.* State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137 (1892); People *v.* Martin, 13 Cal. App. 96, 108 Pac. 1034 (1910); Canadian Crim. Code, § 20; Pen. Code, Cal., § 26; Ga. Code (1882), § 4303; Ross *v.* State, 169 Ind. 388; 82 N. E. 781 (1907). Where the defendant offered to prove that a short time before the commission of the alleged offense, "one Ray drew a revolver on" her and threatened to kill her, thereby "putting her in fear," the court held that the evidence was properly rejected as there was nothing in the offer to show that the act of Ray in drawing his revolver and threatening to kill the defendant had anything to do with her committing the crime charged. Ross *v.* State, *supra.*

[8] Rizzolo *v.* Commonwealth, 126 Pa. 54, 17 Atl. 520 (1889).

[9] Ross *v.* State, *supra.*

[10] Beal *v.* State, 72 Ga. 200 (1883).

[11] Rizzolo *v.* Commonwealth, *supra;* Commonwealth *v.* Reffitt, *supra;* Beale *v.* State, *supra;* Prikle *v.* State, *supra;* McCoy *v.* State, *supra.*

[12] People *v.* Repke, 103 Mich. 459, 61 N. W. 861 (1895); State *v.* Nargashian, 26 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715, 3 Ann. Cas. 1026 (1904); Baxter *v.* People, 8 Ill. 368 (1846); Rizzolo *v.* Commonwealth, *supra;* Pen. Code, Cal., § 26; People *v.* Martin, 13 Cal. 96, 108 Pac. 1034 (1910); Ga. Code (1882) § 4303; Rem. & Bal. Wash. Code, § 4303; Burns *v.* State, *supra;* State *v.* Moretti, *supra;* Minn. Stat. (1894) § 6307.

law.[13] "The social system would be subverted and there would be no protection for persons or property," says the Mississippi court,[14] "if the fear of man needlessly and cravenly entertained should be held to justify or excuse breaches of the criminal law of the state."

The test of the reasonableness of the belief is not whether it was reasonable in such a man as the defendant, but whether it would have been reasonable in a reasonable man,[15] of ordinary fortitude and courage.[16] It is difficult to apply this test. The exceptional nature of the circumstances which impelled the defendant to commit the crime renders it difficult to compare him with a reasonable man, since we are unable to say with any certainty what would have been the conduct of this theoretical man in the same situation. The juror must first imagine a reasonable man, and then decide what would be a reasonable belief for this reasonable man, and then, still performing the functions of a psychologist, he must compare this belief with the belief of the defendant. The decided cases furnish little aid. They furnish illustrations of beliefs which the courts have held to be reasonable or unreasonable, but they furnish no portrait of the "reasonable man."

### The Imminence of the Threatened Injury.

The danger must have been, or must have been believed by the defendant upon reasonable grounds to be, "present, imminent and impending" at the time of the commission of the alleged crime.[17]

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[13] 4 Blackstone, Com. 30.

[14] Bain *v.* State, 67 Miss. 545, 7 South. 408 (1890).

[15] Rizzolo *v.* Commonwealth, *supra.*

[16] United States *v.* Haskell, Fed. Cas. 15,321 (1823); note, 3 Ann. Cas. 1028; 10 Am. & Eng. Enc. L, 2 ed., 347.

[17] Bain *v.* State, *supra;* Ross *v.* State, 169 Ind. 388, 82 N. E. 781 (1907); Pirkle *v.* State, 11 Ga. App. 98, 74 S. E. 709 (1912); Baxter *v.* People, 8 Ill. 368 (1846); Arp. *v.* State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137 (1892); People *v.* Repke, 103 Mich. 459, 61 N. W. 861 (1895); Burns *v.* State, 89 Ga. 527, 15 S. E. 748 (1892); Burton *v.* State, 51 Tex. Cr. Rep. 196, 101 S. W. 226 (1907); People *v.* Martin, 13 Cal. App. 96, 108 Pac. 1034 (1910); Clark & Marshall, Crimes, 2 ed., p. 127; Clark, Crim. L., p. 100. Statutes sometimes so provide. Burns *v.* State, *supra;* Burton *v.* State, *supra;* McCoy *v.* State, 78 Ga. 490, 3 S.

A future, remote or prospective danger is not sufficient,[18] and evidence of such danger is therefore properly rejected.[19] This rule applies irrespective of the character of the person threatened. The fact that he was a minor does not exempt him from its operation.[20]

It is said that this rule is grounded on sound reason and enlightened justice, and a contrary rule would be monstrous and unjust.[21] An analogue is found in the law of self-defense. "If the right of self-defense and forcible resistance against an aggressor exists only in the presence of imminent danger or when an offense is about to be committed, it would be an anomalous condition of the law that would justify or excuse the commision of a felony against the person or property of an entirely innocent person because the person doing the deed had reason to fear and did fear, not an imminent and immediate danger * * * but a future and remote danger and one that in the very nature of things could be averted by innocent methods." [22]

The reason for the rule is asserted to be that unless the danger is imminent and impending the defendant has the power to protect himself from it and can appeal to the law for protection.[23]

The rule was therefore very properly relaxed in a recent case.[24] It appeared that night riding had been going on in the country and a highly excited condition prevailed; that the civil authorities were, in many instances, wholly unable to preserve order and prevent acts of violence and lawlessness and the destruction of property; and that the local authorities, even when supplemented by the entire military power of the state, were un-

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E. 768 (1887); State *v.* Moretti, 66 Wash. 537, 120 Pac. 102 (1912); Paris *v.* State, 35 Tex. Cr. Rep. 82, 31 S. W. 855 (1895); 10 AM. & ENG. ENC. L., 2 ed., 346.

[18] 12 CYC. 161; Carlisle *v.* State, 37 Tex. Crim. Rep. 108, 38 S. W. 991 (1897); Arp. *v.* State, *supra;* Ross *v.* State, *supra;* People *v.* Martin, *supra;* People *v.* Repke, *supra;* CLARKE & MARSHALL, CRIMES, 2 ed., p. 127; STEPHEN, DIG. CRIM. L., § 31; WHARTON, CRIM. L., § 124.

[19] People *v.* Martin, *supra.*

[20] People *v.* Martin, *supra.*

[21] People *v.* Martin, *supra.*

[22] People *v.* Martin, *supra.*

[23] Bain *v.* State, *supra.*

[24] Commonwealth *v.* Reffitt, 149 Ky. 300, 148 S. W. 48, 42 L. R. A. (N. S.) 129 (1912).

able to restore order or prevent the perpetration of gross outrages upon the persons and property of those antagonistic to the success of the night riders. It was properly held that a crime committed under a fear of injury inspired by threats of the night riders was excused even though the danger was not imminent and impending at the time of the commission of the crime.[25]

The apprehension of immediate danger must have continued during the whole time the crime was being committed.[26] This is particularly true of continuing crimes such as treason. The defendant must show that the apprehension of immediate injury continued throughout the whole time he was assisting the enemy and that he "quitted the service as soon as he could; agreeable to the rule laid down in Oldcastle's case, that they joined the rebels *pro timore mortis et recesserunt quam cito potuerant.*" [27]

A reasonable apprehension of immediate injury at the time of the commission of the alleged crime will not excuse the defendant if prior to that time he knew of the approach of the danger and had a reasonable opportunity to avoid it.[28] In Arp *v.* State [29] the evidence of the defendant showed that on the night of the crime he went to Burkhalter's house and was there informed by Burkhalter and Leigth that he must kill Pogue; that they went to Pogue's, which was a considerable distance from Burkhalter's, and the defendant there killed Pogue. The court said:

> "Although it may have been true, that at the time he struck the fatal blow, that he had reason to believe he would be killed by Burkhalter and Leigth, unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them with reasonable safety, and he failed to do so, but remained with them un-

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[25] Commonwealth *v.* Reffitt, *supra.* The crime was "selling pooled tobacco."

[26] Ross *v.* State, *supra;* Baxter *v.* People, *supra;* State *v.* Nargashian, *supra;* McGrowther's Case, *supra;* STEPHEN, DIG. CRIM. L., § 31; KENNEY, CRIM. L., p. 32; DESTY, AM. CRIM. L., § 321.

[27] McGrowther's Case, *supra.*

[28] 21 CYC. 833; WHARTON, HOMICIDE, § 52.

[29] *Supra.*

til the time of the killing, the immediate necessity or compulsion under which he acted at that time would be no excuse to him."

The mere fact that the defendant voluntarily entered into a conspiracy to commit a crime does not preclude him from setting up duress as a defense, if he afterwards abandoned his purpose and at the time of the commission of the alleged crime acted under a reasonable apprehension of immediate injury.[30]

In order that the danger may be held to have been imminent and impending it is ordinarily necessary that the threatener should have been present.[31] The fact that at the place where the defendant committed the alleged crime, the tracks showed that only one person was there is evidence that the danger was not imminent and impending.[32] And where the threatener was a mile away it was held that this showed that the danger was not imminent.[33]

It is not necessary, however, that the threatener should have been actually present in the ordinary meaning of that term. It is sufficient that he was in such proximity to the place of the crime that with the means at hand he had the defendant under his power and control.[34]

### The Reality of the Danger.

It must be regarded as well settled, though there are some *dicta* apparently to the contrary,[35] that if the defendant believed there was imminent danger of injury and his belief was based on reasonable grounds, he will be excused, though there was actually no danger of injury.[36]

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[30] Leach *v.* State, 59 Tenn. 584, 42 S. W. 195 (1897). Subject to the proposition in the preceding paragraph.

[31] Brewer *v.* State, 72 Ark. 143, 78 S. W. 773 (1904); People *v.* Moretti, *supra.* Statutes sometimes so provide. 10 Am. & Eng. Enc. L., 2 ed., 347; Canadian Crim. Code, § 23.

[32] Brewer *v.* State, *supra.*

[33] State *v.* Fisher, 23 Mont. 540, 59 Pac. 919 (1900).

[34] 12 Cyc. 161; Paris *v.* State, *supra.* This is true even though the statute requires that the threatener should be "actually present." A person twenty or thirty paces distant, armed with a shot gun, is "actually present." Paris *v.* State, *supra.*

[35] United States *v.* Vigol, *supra;* United States *v.* Greiner, *supra;* 1 East, P. C. 294; 12 Cyc. 161; 8 R. C. L. 125.

[36] Rizzolo *v.* Commonwealth, *supra,* and cases *infra.*

### The Absence of an Alternative.

The defendant, it is said, must have had no alternative except to commit the crime or suffer the threatened injury.[37] If by reason of superior strength he was able to protect himself against the threatened injury, or if he could have escaped with reasonable safety, at least if he knew or as a reasonable man should have known these facts, he will not be excused.[38] In a prosecution for murder the court said:

> "If it be true that one of his co-conspirators was near by with a gun, and in a threatening attitude toward the defendant, * * * that would work no diminution of the offense. In such case * * * it was his duty to spare Heck [the deceased] and at the same time to protect himself by turning his weapon upon his threatening confederate. He could not with any degree of legal palliation elect a course absolutely safe to himself, and slay an innocent man, rather than take some risk to himself in an equal combat with a relentless companion.[39]

### The Number of Threateners.

"Compulsion by threats of injury," says Stephen,[40] "* * * is recognized as an excuse for crime only, as I believe, in cases in which the compulsion is applied by a body of rebels or rioters." This is probably the present law of England.[41] The English cases seem to make a "clear contrast between coercion by rebels or rioters in some number and coercion by individuals." [42]

Two persons may differ so much in strength and weapons that it would seem that a degree of duress sufficient to excuse

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[37] Brewer *v.* State, *supra;* Leach *v.* State, *supra;* Arp *v.* State, *supra;* State *v.* Nargashian, *supra;* Bain *v.* State, *supra.* All of these cases except the last were prosecutions for murder.

[38] Bain *v.* State, *supra;* Brewer *v.* State, *supra;* Leach *v.* State, *supra;* State *v.* Nargashian, *supra;* 1 East, P. C. 72; 21 Cyc. 832.

[39] Leach *v.* State, *supra.* See also, Brewer *v.* State, *supra.* "The compulsion which will excuse a criminal act must arise without the negligence or fault of the person who insists upon it as a defense." Gillett, Crim. L., § 7, quoted in Ross *v.* State, *supra.*

[40] 2 Stephen, Hist. Crim L., p. 106.

[41] 9 Halsbury, L. Eng. 73. [42] Stroud, Mens Rea, p. 281.

may have been exercised by the one over the other.[43] In the United States it is accordingly held that the defendant need not have been threatened by a plurality of persons.[44] Indeed, it seems that threats by one against four may be sufficient to excuse the four if the one is so obviously an overmatch for the four as to excite in the minds of the four a reasonable apprehension of injury.[45]

### Times of War and Times of Peace.

Hale says:[46]

> "There is to be observed a difference between times of war, or public insurrection, or rebellion, and the times of peace; for in times of war, and public rebellion, when a person is under so great a power that he cannot resist or avoid, the law in some cases allows an impunity for parties compell'd or drawn by fear of death, to do some acts in themselves capital, which admit of no excuse in times of peace. * * *
>
> "Now as to time of peace.
>
> "If a man be menaced with death, unless he commit an act of treason, murder, or robbery, the fear doth not excuse him, if he commit the act; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ of precept *de securitate pacis.*"

This reasoning is very weak. In most cases, even in times of peace, in which threats of immediate injury are used to compel a person to commit a crime, there is neither time nor opportunity to resort to the protection of the law.[47] The distinction drawn by Hale has not been adopted in this country.

### The Character of the Defendant's Participation.

A person may incur responsibility in respect to a certain crime: (1) By actually committing the criminal act; (2) by aiding or abetting another to commit it; (3) by advising or

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[43] Kenny, Crim. L., p. 73.

[44] Ross *v.* State, *supra;* People *v.* Martin, *supra;* Carlisle *v.* State, *supra;* Fisher *v.* State, *supra;* Bain *v.* State, *supra;* State *v.* Paris, *supra.*

[45] United States *v.* Haskell, Fed. Cas. 15,321 (1823).

[46] 1 Hale, P. C. ch. VIII, p. 49.

[47] 2 Stephens, Hist. Crim. L., p. 107.

commanding its commission; (4) by assisting one who committed, or aided in the commission, or advised the commission, of the criminal act.

The common law regarded all four methods of participation as being equally reprehensible. At least it imposed the same punishment upon all four classes of participants.[48] At present the same rule prevails, except that a much more lenient punishment is imposed upon participants of the fourth class. The defense of duress is probably available to all four classes of participants. It has been so decided as to participants of the first, second and fourth classes.[49] A case where duress is invoked by a participant of the third class is not likely to arise. The cases seem to require the same character of duress to excuse a participant of the second [50] or fourth class [51] as is required to excuse a participant of the first class.[52]

## EVIDENCE.

The question whether or not the defendant acted under duress, as defined by the law, is one of fact for the jury,[53] and in deciding it the jury should subject the situation of the defendant to a careful scrutiny.[54] The duress may be proved by the confession of the defendant; but the jury are, of course, not required to believe that part of the confession which relates to duress, if it seems to them improbable or unreasonable.[55] The mere declaration of the defendant that he "acted under duress" is not sufficient. There must be some evidence that violence was threatened and danger apparently existed.[56] The fact that the de-

[48] Accessories after the fact to misdemeanors were not punished at all.

[49] Burns *v.* State, *supra;* and cases *infra.*

[50] Pirkle *v.* State, *supra.*

[51] Burns *v.* State, *supra.*

[52] In Rizzolo *v.* Commonwealth, *supra,* it is apparently held that where the crime charged is murder, duress is available to a participant of the second but not to a participant of the first class to reduce the degree of murder. Statutes sometimes provide that duress shall be a defense to one who commits or participates in crime. Pirkle *v.* State, *supra.*

[53] Beale *v.* State, *supra;* McCoy *v.* State, *supra;* Commonwealth *v.* Reffitt, *supra.*

[54] ROBINSON, AM. JURISP., § 45.

[55] Brewer *v.* State, *supra.*

[56] Pennsylvania *v.* Morrison, *supra.*

fendant was weak in will power, easily persuaded, timid and shy is not admissible as independent evidence to prove duress.[57] Evidence that the defendant was requested, commanded or persuaded to commit the crime by his mother is not sufficient to prove duress.[58] Where the defendant claims that he was compelled by a mob to go with it and assist in a crime, he may introduce evidence that before he had gone many yards he had agreed with another to break away at the first opportunity and that he did break away in a short time.[59]

## The Burden of Proof.

There is a conflict of authority as to the burden of proof. It has been held that the defendant is only required to raise in the minds of the jury a reasonable doubt as to whether or not he acted under duress and that, therefore, an instruction that "the evidence and circumstances must convince the jury that he acted through fear" is inapt and places too heavy a burden upon the defendant.[60]

In a recent Ohio case it is held that duress is an affirmative defense and the burden is upon the defendant to prove it by a preponderance of the evidence. "The principle," says that court, "that the burden of proof is on the state has reference to the establishment of the *corpus delicti* and the defendant's complicity; but when the defendant relies upon distinct substantive matter for exemption or immunity, the burden of proving such matter is upon the defendant." [61] In several cases the burden has been assumed by the defendant without discussion.[62]

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[57] Ross *v.* State, *supra.*

[58] Carlisle *v.* State, *supra.*

[59] Rex *v.* Crutchley, 5 C. & P. 133 (1832).

[60] Pirkle *v.* State, *supra.* But the giving of such instruction is not an error of sufficient gravity to require a new trial if the court has expressly charged that the burden is on the state to prove to the satisfaction of the jury beyond all reasonable doubt that the accused did participate in the commission of the offense. Pirkle *v. State, supra.*

[61] State *v.* Sappienza, 84 Ohio St. 63, 95 N. E. 381, 23 Ann. Cas. 1109 (1911).

[62] Note, 23 Ann. Cas. 1112, citing Arp. *v.* State, *supra;* Ross *v.* State, *supra;* State *v.* Thomas, *supra;* People *v.* Repke, *supra.*

INSTRUCTIONS.

The purpose of instructions where duress is relied upon as a defense, as in other cases, is to inform the jury of the principles of law which are applicable to the evidence, and no instruction should be given which does not promote that purpose. Instructions should not be given unless they may be fairly understood and easily comprehended by the jury. It is the duty of the court to refuse instructions which are so drawn, either from carelessness or design, that they will be more likely to mislead than instruct the jury, although after a careful study and investigation the court may be able to extract a correct principle of law from them.[63]

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[63] Baxter *v.* People, *supra.*